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No. 129 Original

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

MARYLAND'S ANSWER, COUNTERCLAIM, AND MOTION FOR APPOINTMENT OF SPECIAL MASTER

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July 31, 2000

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ANSWER

Defendant, the State of Maryland ("Maryland"), pursuant to the Order of this Court of May 30, 2000, for its answer to the Bill of Complaint ("Complaint") filed by the Plaintiff, the Commonwealth of Virginia ("Virginia"), states:

1. Maryland denies the allegations contained in Paragraph 1 of the Complaint.

2. Maryland is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of the Complaint, and therefore denies the same.

3. Maryland admits that Virginia is a party to the Black-Jenkins Award of 1877, the Potomac River Compact of 1958, Article VII of the Compact of 1785, and the Potomac River Low Flow Allocation Agreement (LFAA). Maryland admits the allegations contained in the second sentence of Paragraph 3 of the Complaint. The remainder of Paragraph 3 consists of argument, to which no answer is required, or allegations as to the truth of which Maryland is without knowledge or information sufficient to form a belief, and therefore denies the same.

4. The allegations contained in Paragraph 4 of the Complaint consist of argument, to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the allegations contained in Paragraph 4.

5. Maryland admits the allegations contained in the second sentence of Paragraph 5 of the Complaint. Maryland is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 5 of the Complaint, and therefore denies the same.

6. Maryland admits the allegations contained in Paragraph 6 of the Complaint.

7. Maryland admits the allegations contained in Paragraph 7 of the Complaint.

8. Maryland admits the allegations contained in the first two sentences of Paragraph 8 of the Complaint. The quotation purporting to be Article VII of the Compact of 1785 varies in several respects from the version of the Compact ratified by Maryland on November 7, 1785, 1785 MD. LAWS, Ch. 1, and the version of the Compact reflected in the Appendix A to the Complaint. Accordingly, Maryland denies the remaining allegations contained in Paragraph 8.

9. While Maryland admits that the Compact of 1785 did not explicitly address the boundary between the States, the Compact of 1785 was based on the premise that the Potomac River lay within Maryland territory. Maryland admits the remaining allegations contained in Paragraph 9 of the Complaint.

10. With respect to the allegations contained in the first sentence of Paragraph 10 of the Complaint, Maryland admits that the Maryland General Assembly in 1957 repealed the Act of the 1785 General Assembly ratifying the Compact of 1785. *See* 1957 MD. LAWS Ch. 766. Maryland further admits that the Maryland General Assembly in 1957 sought to exercise jurisdiction over fisheries in the tidal portion of the Potomac River without concurrence from Virginia. *See* 1957 MD. LAWS Ch. 770. Maryland admits the allegations contained in the second, third, fourth, and fifth sentences contained in Paragraph 10 of the Complaint. The last sentence purports to characterize Article VII, Section 1 of the Compact of 1958, which speaks for itself. To the extent Virginia's characterization varies from the terms of Article VII, Section 1, it constitutes argument to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the allegations contained in the last sentence of Paragraph 10.

11. Maryland admits the second and third sentences of Paragraph 11 of the Complaint. Maryland further admits that, from 1958 to the present, Virginia and Maryland enjoyed a period of cooperation insofar as Virginia and its political subdivisions and citizens recognized Maryland's jurisdiction in the Potomac. Maryland is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 11 of the Complaint, and therefore denies the same.

12. Maryland admits the allegations contained in the first sentence of Paragraph 12 insofar as Maryland signed the LFAA in 1978 with Virginia and the other signatories, but denies the allegation that the LFAA was entered into as a condition precedent "to the investment of large sums of money by the [Fairfax County Water] Authority and the Washington Suburban Sanitation Commission (WSSC) to build facilities to withdraw and treat water from the Potomac River." Rather, the LFAA was required as a condition precedent to the issuance of permits to the Authority and WSSC for the construction of drinking water intakes and was motivated out of concern that the demand for water from the Potomac exceeded its flow during low flow conditions. Maryland denies the allegations in the second sentence of Paragraph 12. The fifth prefatory paragraph of the LFAA, to which Virginia appears to refer in the second sentence of Paragraph 12, states simply that the parties to the LFAA "recognize that other riparian interests, such as communities located in Virginia, may in the future desire to withdraw and use water from the segment of the Potomac River which is the subject of the within Agreement, and provision is made herein requiring that access by any of them to such water be made subject to the provisions of this Agreement." The third and fourth sentences of Paragraph 12 purport to characterize the content of the LFAA, which speaks for itself. To the extent Virginia's characterization varies from the terms of the LFAA, it constitutes argument to which no answer is

required. However, to the extent necessary for purposes of this Answer, Maryland denies the allegations contained in the third and fourth sentences of Paragraph 12 of the Complaint. The allegations contained in the fifth sentence of Paragraph 12 are vague and unclear. Accordingly, Maryland is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the fifth sentence of Paragraph 12, and therefore denies the same.

13. Maryland admits the allegations contained in the first sentence of Paragraph 13 of the Complaint. The allegations contained in the second, third, and fourth sentences of Paragraph 13 purport to characterize the Water Supply Coordination Agreement, which speaks for itself. To the extent Virginia's characterization varies from the terms of the Agreement, it constitutes argument to which no answer is required. To the extent necessary for purposes of this Answer, however, Maryland denies the allegations contained in the second, third, and fourth sentences of Paragraph 13 of the Complaint. With respect to the fifth sentence of Paragraph 13, Maryland admits that the Co-op is presently engaged in a water demand study for the year 2020, but adds that the study is limited to the Metropolitan Washington area.

14. Maryland admits the allegations contained in the first sentence contained in Paragraph 14 of the Complaint. With respect to the third sentence of Paragraph 14, Maryland admits that water stored in the reservoirs for purposes of water supply was used for the first time during the summer drought of 1999 to supplement the flow of the Potomac River and that the restrictions on water withdrawal in the LFAA were not triggered. Maryland is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 14 of the Complaint, and therefore denies the same.

15. Maryland admits the allegations contained in the second and fourth sentences contained in Paragraph 15 of the Complaint. Maryland further admits that, under Sections 5-504 and 5-507 of the Environment Article of the Annotated Code of Maryland, Maryland requires a waterway construction permit for certain regulated activities within the nontidal stretch of the Potomac River, although the term "improvement" does not appear in the relevant statutory provisions. Maryland admits further that, under Section 16-202 of the Environment Article, Maryland requires a tidal wetlands license for the dredging or filling of the lands beneath the tidal portion of the Potomac River. Maryland also admits that Section 5-507 of the Environment Article requires the Maryland Department of the Environment (MDE) to "weigh all respective advantages and disadvantages" and to issue or deny permits based on whether the proposed use or construction are in the "best public interest." Maryland admits that MDE has taken the position that it may deny permits for projects that are unnecessary in that either they provide no advantages or benefits or there exist practicable alternatives to the project that will provide comparable advantages with fewer disadvantages. Maryland denies the remaining allegations contained within Paragraph 15.

16. The allegations contained in Paragraph 16 of the Complaint consist of argument, to which no answer is required. Nevertheless, Maryland admits that, under Article VII of the Compact of 1785, the citizens of Virginia who own property riparian to the tidal portion of the Potomac have full property in the shores of the Potomac adjoining their lands along with the riparian privilege of making and carrying out wharves and other improvements so as not to impact navigation. Although the exercise of that privilege may extend beyond the low water mark, it is subject to regulation by Maryland. Insofar as the allegations contained in Paragraph 16 differ from this description of the rights of Virginia citizens under Article VII of the Compact of 1785, Maryland denies the same.

17. The allegations contained in Paragraph 17 consist of argument, to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the allegations contained in Paragraph 17 of the Complaint.

18. Maryland admits that the Authority supplies drinking water to approximately 1.2 million people, but is without information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 18 of the Complaint, and therefore denies the same.

19. Maryland admits the allegations contained in the first sentence contained in Paragraph 19 of the Complaint. Maryland further admits that the Authority's shoreline intake periodically accumulates grass, leaves, and ice but denies that such accumulation has "clogged" the intake to the extent that water service to any of the Authority's customers has ever been interrupted. Maryland further admits that the turbidity of the water drawn into the Authority's shoreline intake increases following local rainstorms due to sediment-laden run-off from construction sites in two upstream Virginia tributaries, Sugarland Run and Broad Run. In order to treat this more turbid water to applicable finished water quality standards, the Authority must increase the amount of treatment chemicals applied and must remove the additional solids generated by the treatment process at some additional expense. Although the treatment process is marginally more expensive during these increased turbidity events, the process itself remains essentially unchanged. Moreover, these types of turbidity increases occur throughout the Potomac, including the mid-river location that the Authority proposed for its second intake. Consequently, Maryland denies that the treatment process is "more difficult" at the shoreline as compared to mid-river. Maryland is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 19 of the Complaint, and therefore denies the same.

20. Maryland admits the allegations contained in the second sentence of Paragraph 20 of the Complaint and admits further that a consultant retained by the Authority recommended that the Authority move forward with its plans to construct a mid-river intake. Maryland is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 20 of the Complaint, and therefore denies the same.

21. Maryland denies the allegations contained in the first and fifth sentences of Paragraph 21 of the Complaint. Maryland admits the allegations contained in the second sentence, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 21 of the Complaint, and therefore denies the same.

22. Maryland admits that the Authority currently produces finished drinking water that complies with all federal and state water quality standards and, in fact, expects to be able to meet more stringent future standards with the same shoreline intake and water treatment process it currently employs. Maryland further admits that, in general, high turbidity in raw water following local rainstorms can be associated with elevated levels of waterborne pathogens, including *Cryptosporidium*. However, the presence of *Cryptosporidium* within a given source water depends on whether there are significant sources of *Cryptosporidium* in the watershed upstream that can be washed into the source water during rain events. High turbidity in source water from watersheds with comparatively minor sources of *Cryptosporidium* would not necessarily be associated with elevated levels of *Cryptosporidium*.

Maryland admits the allegations contained in the second sentence of Paragraph 22. With respect to the third sentence, Maryland admits that there is no current treatment

for cryptosporidiosis and that cryptosporidiosis poses a risk of death for immuno-compromised individuals. While the disease can cause extreme gastrointestinal illness in some healthy people, many others may only be mildly affected, and many others still may be infected with *Cryptosporidium* oocysts without suffering any of the symptoms of cryptosporidiosis. For all healthy people, however, the disease is self-limiting and runs its course in one to two weeks.

With respect to the fourth sentence, Maryland admits that an outbreak of cryptosporidiosis occurred in the City of Milwaukee, Wisconsin in April, 1993, resulting in more than 100 deaths and in excess of 400,000 gastrointestinal illnesses. The cause of the outbreak, however, has not been conclusively determined. Maryland admits that the source waters were contaminated, most likely from upstream cattle operations and sewage treatment plants, which are the most significant known sources of *Cryptosporidium*. However, the operation of the treatment plant that generated the contaminated finished water was also a potential cause of the outbreak. While the finished water met then-existing standards for turbidity, the treatment plant was not employing the optimized water treatment processes that the Authority and other water utilities now use to ensure safe drinking water. Accordingly, Maryland denies the remaining allegations contained in the fourth sentence of Paragraph 22.

Maryland denies the allegations contained in the fifth sentence of Paragraph 22. Some of the known outbreaks of cryptosporidiosis have occurred as a result of well water that became contaminated by *Cryptosporidium* because of the influence of unfiltered surface water. Furthermore, while many of the known outbreaks occurred in communities where water utilities used conventional filtration systems that met all state and federal water quality standards applicable at the time, those standards may not have been protective of the public health. For example, the

federal standards that were being met at the time of the Milwaukee outbreak in April 1993 were much less stringent than those that currently apply, and even less stringent than newly promulgated EPA standards.

With respect to the sixth sentence of Paragraph 22, Maryland admits that the Environmental Protection Agency (EPA), in its Interim Enhanced Surface Water Treatment Rule, set a Maximum Contaminant Level Goal (MCLG) of zero for *Cryptosporidium*. The MCLG, however, is a non-enforceable goal. The enforceable requirements of the rule regarding *Cryptosporidium* require the use of a treatment technique that achieves a 99% removal rate. Maryland denies the remaining allegations contained in Paragraph 22 of the Complaint.

23. Maryland admits that disinfection byproducts are generally considered to be animal carcinogens and suspected to be human carcinogens, but denies the remaining allegations contained in Paragraph 23 of the Complaint. Whether the treatment of surface water will generate disinfection byproducts depends on the source of the turbidity. Disinfection byproducts are created by the reaction of water treatment disinfectants with certain kinds of organic material only. The treatment of highly turbid raw water will not generate disinfection byproducts if the source of turbidity is inorganic materials, such as clays and silts. Whether the treatment of surface water will generate disinfection byproducts also depends on where disinfection occurs within the treatment process.

24. Maryland admits that using source water that is significantly lower in the organic precursors to disinfection byproducts can reduce the quantity of disinfection byproducts in finished drinking water. Maryland further admits that using source water that contains significantly less *Cryptosporidium* can provide an additional barrier in the treatment process against waterborne pathogens. Maryland denies the remaining allegations contained in

Paragraph 24 of the Complaint.

25. The allegations contained in the first sentence of Paragraph 25 of the Complaint purport to characterize Virginia Department of Health regulations set forth at 12 Va. Admin. Code § 5-590-820, which speaks for itself. To the extent Virginia's characterization varies from the terms of § 5-590-820, it constitutes argument to which no answer is required. To the extent necessary for purposes of this Answer, however, Maryland denies the allegations contained in the first sentence of Paragraph 25 of the Complaint. Maryland admits that Virginia Health Department regulations state that "preference" shall be given to the "best available" sources of supply and that "sources shall be selected and maintained on a basis which will assure that the water is continuously amenable to available treatment processes" and that the water "will meet the current requirements of the board" with respect to impurities. 12 Va. Admin. Code § 5-590-820 (1999). Maryland further admits that the Virginia Commissioner of Health has written a letter supporting the Authority's proposal for a mid-river intake, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the second sentence of Paragraph 25 of the Complaint, and therefore denies the same.

26. Maryland admits the second and third sentences of Paragraph 26 of the Complaint. Maryland further admits that the Authority submitted on or about January 4, 1996 a Joint Federal/State Application for the Alteration of Any Floodplain, Waterway, Tidal or Nontidal Wetland in Maryland. Maryland is without knowledge or information sufficient to form a belief as to whether the Authority applied for any other "necessary federal and state permits" and therefore denies the same.

27. Maryland admits the allegations contained in Paragraph 27 of the Complaint.

28. Maryland admits the allegations contained in Paragraph 28 of the Complaint with the added clarification that the water appropriation permit amendment was granted by the Water Rights Division of the MDE Water Management Administration, a division separate from the Nontidal Wetlands and Waterways Division that evaluated the proposed mid-river intake.

29. Maryland denies the allegations contained in Paragraph 29 of the Complaint.

30. Maryland admits that the Norfolk District of the U.S. Army Corps of Engineers (Corps) determined that the original proposal submitted by the Authority qualified for authorization under Abbreviated Standard Permit 92-ASP-18 for activities of "minimal environmental consequence." Abbreviated Standard Permit 92-ASP-18, however, by its own terms applies only to "work undertaken within the geographical limits of the Commonwealth of Virginia," not Maryland. Because the construction activities proposed to take place within the Potomac lie within Maryland territory, the federal authorization is ineffectual. The Corps has since suspended the authorization and informed members of the Audubon Naturalist Society that it will re-evaluate the propriety of authorizing the Authority's project under the Abbreviated Standard Permit if MDE issues a permit under Maryland state law. Consequently, Maryland denies the allegation that the Corps issued "the necessary federal permits" contained in Paragraph 30 of the Complaint.

31. Maryland denies the allegations contained in the first sentence of Paragraph 31 of the Complaint. Maryland admits that the project became publicly controversial with commenters on both sides of the Potomac urging MDE to deny the permit. While some Maryland state legislators likewise objected to the Authority's project, Maryland denies that the same legislators "pressured" or improperly influenced MDE to "withhold" the permits.

32. Maryland denies the first sentence of Paragraph 32 of the Complaint. Although General Assembly Delegate Jean Cryor wrote MDE voicing her concerns about the project, the letter cited by Virginia does not urge MDE to either withhold or deny the requested permits. With respect to the second sentence of Paragraph 32, Maryland admits that it held a public informational hearing on the Authority's application. Under applicable Maryland law, MDE must hold a public informational hearing if one is requested in response to a public notice published in a "newspaper of general circulation in the area where the proposed activity would occur." MD. CODE ANN., ENVT. ART. § 5-204(b) & (c). In the Authority's case, the public notice for the project was mistakenly published in a Prince George's County newspaper even though the activities were proposed for Montgomery County. As a Montgomery County delegate, Delegate Cryor's role in MDE's holding a public informational hearing was limited to pointing out the deficiencies in the public notice for the project and submitting one of the several requests for a public informational hearing that MDE received. Maryland admits the allegations contained in the third and fourth sentences of Paragraph 32 of the Complaint.

33. Maryland admits that a letter to the editor purporting to have been written by Mr. John C. Webb, Jr. of Gaithersburg, Maryland was published in the Fairfax Journal on October 21, 1997, and that Virginia accurately quotes from the letter. However, Maryland denies the contents of the quoted portion of the letter.

34. Maryland admits that the Water Management Administration (WMA) of MDE denied the Authority's waterway construction permit on December 10, 1997 and declined to act on the Authority's request for a Section 401 water quality certification. The WMA based its decision to deny the permit largely on the fact that the Authority had not demonstrated that the project would provide benefits sufficient to outweigh its environmental impacts,

particularly when the Authority had consistently and without interruption provided finished drinking water that met all applicable federal and state standards while using the existing shoreline intake, and when alternatives existed that would address sediment pollution at its source and obviate even the Authority's purported need for a mid-river intake. Maryland denies the allegation in the last sentence of Paragraph 34 of the Complaint on the grounds that MDE has not yet denied a waterway construction permit to the Authority. MDE is due to render a final decision in the matter on or before September 25, 2000. However, Maryland admits that, based on information currently available, the WMA's denial of a permit to the Authority was the first time that the WMA has ever denied a waterway construction permit for construction on the nontidal Potomac, although the WMA has denied permits for construction on other waters throughout Maryland, including the tidal Potomac. Maryland denies the remaining allegations contained in Paragraph 34 of the Complaint.

35. The first sentence of Paragraph 35 of the Complaint purports to characterize the content of a letter written by Maryland Governor Parris N. Glendening, which speaks for itself. To the extent Virginia's characterization varies from the terms of the letter, it constitutes argument to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the allegations contained in the first sentence of Paragraph 35. Maryland is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 35 of the Complaint, and therefore denies the same.

36. Maryland admits that the Authority requested, and was granted, a contested case hearing to contest the WMA's denial of the permit. Maryland further admits that the contested case hearing was held by an Administrative Law Judge (ALJ) with the Maryland Office of Administrative

Hearings, but denies that there is "no final resolution in sight." In fact, under a scheduling agreement entered into by the parties, a final decision is due by September 25, 2000. The remainder of the first two sentences of Paragraph 36 consists of argument to which no answer is required but, for purposes of this Answer, Maryland denies the same. Maryland admits the allegations contained in the third and fourth sentences of Paragraph 36 of the Complaint. Maryland denies the allegations contained in the last sentence of Paragraph 36 insofar as the initial permit denial was rendered by the WMA, while it is MDE that issues the final decision on the permit.

37. Maryland admits that MDE entered into stipulations, which speak for themselves. To the extent Virginia's characterization of these stipulations varies from their terms and the parties' intent, it constitutes argument to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the remaining allegations contained in the first and third sentences of Paragraph 37 of the Complaint. Maryland denies the allegations contained in the second sentence of Paragraph 37. With respect to the allegations contained in the fourth and fifth sentences of Paragraph 37, Maryland admits that MDE has to date not issued a waterway construction permit to the Authority. Maryland admits further that MDE contends in the contested case hearing that the Authority has failed to identify specific advantages that outweigh the environmental impacts that construction of the proposed mid-river intake would cause. Maryland also admits that MDE contends further that the Authority should take steps to address the sources of sediment pollution that impair water quality at the shoreline rather than simply building further out from the shore. Maryland denies the remaining allegations contained in the fourth and fifth sentences of Paragraph 37.

38. Maryland admits that the ALJ with the Maryland Office of Administrative Hearings ruled that MDE's permit

denial will be evaluated according to the criteria set forth in the applicable statute and that the Authority's allegations of political influence are not relevant. Maryland denies the remaining allegations contained in the first sentence of Paragraph 38 of the Complaint. Maryland admits the second and third sentences of Paragraph 38.

39. Maryland admits the allegations contained in the first sentence of Paragraph 39 of the Complaint. Maryland further admits that the MDE Final Decision Maker directed the ALJ to hear evidence on the need-related issues, such as whether water quality is better at the middle of the river, whether water at the shoreline presents a greater risk of *Cryptosporidium*, and whether taking steps to improve the enforcement of erosion and sediment controls in the Sugarland Run and Broad Run watersheds would address sedimentation at the shoreline intake. Maryland also admits that the Final Decision Maker, like the ALJ, declined to rule on the Authority's compact arguments. Maryland denies the remaining allegations contained in the second and third sentences of Paragraph 39. Maryland admits the allegations contained in the last sentence of Paragraph 39 and adds that the ALJ issued a proposed decision on May 10, 2000 recommending that MDE issue a permit to the Authority. The parties have filed exceptions, with a final decision in the case due by September 25, 2000.

40. Maryland denies the allegations contained in Paragraph 40 of the Complaint.

41. Maryland admits that, on February 3, 2000, Delegate Cryor introduced into the Maryland General Assembly House Bill 395, the provisions of which speak for themselves. To the extent Virginia's characterization of the provisions of H.B. 395 varies from their terms, it constitutes argument to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the remaining allegations contained in the first, third, and fourth sentences of Paragraph 41 of the Complaint.

Maryland admits that, on February 4, 2000, Senate Bill 729 was introduced into the Maryland Senate. The provisions of S.B. 729 speak for themselves. To the extent Virginia's characterization of the provisions of S.B. 729 varies from their terms, it constitutes argument to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the remaining allegations contained in the second, fifth, and sixth sentences of Paragraph 41. Maryland denies the allegations contained in the last sentence of Paragraph 41.

Maryland adds that, since the filing of Virginia's Complaint, the Maryland General Assembly enacted amended versions of H.B. 395 and S.B. 729. Both bills would have allowed MDE to issue a permit to the Authority on similar terms while the required studies are being performed. S.B. 729, but not H.B. 395, established specific dates for completion of the required studies. Maryland Governor Parris N. Glendening signed S.B. 729 into law and vetoed H.B. 395. The Authority has already conceded in the contested case hearing process that it can meet the conditions set forth in S.B. 729. Accordingly, MDE has the ability under S.B. 729 to issue a waterway construction permit to the Authority in the administrative proceeding.

42. Maryland admits that S.B. 729 has a June 1, 2000 effective date. The remaining allegations contained in the first and second sentences of Paragraph 42 of the Complaint consist of argument, to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the remaining allegations contained in the first and second sentences of Paragraph 42. Maryland admits that legislation similar to S.B. 729 was passed by each of the two chambers of the Maryland General Assembly in 1999 but a final, reconciled bill had not passed both chambers when the session ended at midnight on April 12, 1999. Maryland denies the remaining allegations contained in the third sentence of Paragraph 42.

43. Maryland admits that the Authority submitted its permit application in January 1996, that the WMA denied the permit in December 1997, that the Authority requested a contested case hearing challenging the permit denial in December 1997, and that a final decision based on the record developed at the contested case hearing is due from MDE on September 25, 2000. Maryland denies the remaining allegations contained in Paragraph 43 of the Complaint.

44. Maryland admits the allegations contained in the first, second, and third sentences of Paragraph 44 of the Complaint. Maryland denies the allegations contained in the final sentence of Paragraph 44.

45. Maryland denies the allegations contained in the first and third sentences of Paragraph 45 of the Complaint. Maryland admits the allegations contained in the second and fourth sentences of Paragraph 45.

46. Maryland denies the allegations contained in the first, second, and third sentences of Paragraph 46 of the Complaint. Virginia has already recognized in the 1958 Compact that "Maryland is the owner of the Potomac River bed and waters to the low watermark of the southern shore thereof." Preamble, Potomac River Compact of 1958, codified at MD. CODE ANN., NAT. RES. ART. § 4-306. The allegations contained in the last sentence of Paragraph 46 consist of argument, to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the allegations contained in the last sentence of Paragraph 46.

47. Maryland admits the allegations contained in Paragraph 47 of the Complaint.

48. Maryland denies the allegations contained in Paragraph 48 of the Complaint.

AFFIRMATIVE DEFENSES

49. Maryland incorporates each and every admission, denial, and averment made by Maryland in Paragraphs 1 through 48 as though fully set forth herein. Maryland asserts separately and/or alternatively, even if inconsistent, the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

50. Virginia's claims are barred by the doctrine of estoppel.

SECOND AFFIRMATIVE DEFENSE

51. Virginia's claims are barred by the doctrine of waiver.

THIRD AFFIRMATIVE DEFENSE

52. Virginia's claims are barred by the doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

53. Virginia's claims are barred by Virginia's consent.

FIFTH AFFIRMATIVE DEFENSE

54. Virginia's claims are barred by its election of remedies.

SIXTH AFFIRMATIVE DEFENSE

55. Virginia's claims are barred by Virginia's failure to exhaust all administrative remedies.

SEVENTH AFFIRMATIVE DEFENSE

56. Virginia's Complaint fails to state a claim upon which relief can be granted.

COUNTERCLAIM

Maryland asserts the following counterclaim against Virginia, even if found to be alternative to or inconsistent with Maryland's other claims or defenses in this action, stating and alleging as follows:

57. The Court has jurisdiction of this counterclaim under Article III, Section 2, Clause 2 of the Constitution of the United States, and Paragraph (a), Subsection (1), Section 1251, Title 28 of the United States Code.

58. Maryland owns and has sovereignty over the entirety of the bed and waters of the Potomac River to the low water mark on the Virginia side.

59. As the sovereign owner of the portion of the Potomac River within its territory, Maryland possesses traditional police power authority to regulate activities in the Potomac lying within Maryland and extending to the low water mark on the Virginia side, and has the obligation to exercise that authority in the public interest.

60. Maryland's police power authority over the Maryland portion of the Potomac River includes the right to regulate activities carried out by Virginia entities within the bed and waters of the Potomac lying within Maryland and extending to the low water mark on the Virginia side.

WHEREFORE, the State of Maryland prays that the Court:

1. Declare that Maryland's territorial sovereignty includes the right to regulate the activities of Virginia entities that take place in the bed and waters of the Potomac River lying within Maryland and extending to the low water mark on the Virginia side.

2. Award Maryland such costs and expenses, including reasonable attorney fees, as this Court deems just and proper.

Respectfully submitted,

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MOTION FOR APPOINTMENT OF SPECIAL MASTER

Defendant, the State of Maryland, by its Attorney General, joins Virginia in respectfully requesting the Court to appoint a suitable person as Special Master in this action and to refer this matter to him or her with authority to take evidence and to report the same to the Court with his or her findings of fact, conclusions of law, and recommendations for decree, all to be subject to approval or other disposition by the Court.

In support of this motion, Defendant calls the attention of this Court to the pleadings, an inspection of which discloses a variety of issues, the handling of which would benefit from the appointment of a Special Master.

Respectfully submitted,

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